No. 97-1218

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

NATIONAL STEEL AND SHIPBUILDING COMPANY,

Petitioner,

vs.

OSCAR SMITH; MARK DRISCOLL; JOHN PARASKEVOPOULOS; GEORGE LOPEZ; JUAN P. CUBILLAS; JUAN MARQUEZ; MICHAEL RAY NASH; HECTOR MANUEL NAVARRO; STEVE HARDING; IRMA CAMACHO; LUIS BARCELO DURAZO; WILLIAM N. JORDAN; STANLEY E. TURNER; ROMEO DELEON; FRANCISCO BARRON; OSCAR NEVAREZ; ROBERT J. GILL; EDUARDO LENCIONI; PERRY MASTAW; ANTONIO MORALEZ; RODNEY RAMSEYER; MARIO CASTRO and NORRIS FISHMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether claims premised upon violations of the Americans with Disabilities Act brought forth by individual workers can be pursued in federal court against a unionized employer, just as any other civil rights claim, or are such claims within the exclusive jurisdiction of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding with the exception of Irma Camacho. Petition incorrectly lists Respondent as Irma Camacha.

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STATEMENT OF THE CASE

A. Statement of Facts

Until September 30, 1992, NASSCO was a union shop operating under the terms of a collective bargaining agreement with seven different unions. Since the expiration of that agreement on September 30, 1992, NASSCO and the unions have been engaged in collective bargaining.

Typical to the shipyard industry are periods of lay offs during slow downs in production. Under the previous bargaining agreement layoffs were determined by seniority. On April 27, 1993, NASSCO unilaterally changed this previous policy and instituted a performance based rating system referred to as the Performance Evaluation and Communication Program, ("PECP"). In part, the PECP provides:

> **A light or restricted duty employee who is doing work within his/her trade's job description, will be rated just as any other employee.** An employee who is working outside of his/her trade's job description due to limitations or restrictions imposed by his/her doctor, will be frozen until he/she resumes work in his/her trade.

(Emphasis added).

As a matter of policy, therefore, a welder, shipfitter, painter or carpenter who can do substantially the whole of their job requirements will not be provided any accommodation should they have a disability. They will be expected to perform exactly as the able bodied worker without any consideration for their disability and will be rated accordingly. If they can do their job but cannot, for instance, stand as long, bend down as far, breathe

as well, lift as frequently, they can (and undoubtedly will) be down rated with respect to their productivity. Once Petitioner instituted this policy, workers with job injuries, or non-industrial disabilities, were systematically low rated and the first to be laid off during lay off periods pursuant to the PECP. Thus, the PECP is being used by Petitioner as a tool to carry out discriminatory practices in violation of the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12101, *et seq.*

PROCEEDINGS BELOW

Respondents' claims are grounded upon Petitioner's discrimination against Respondents due to their physical limitations in violation of the ADA. Respondents allege that *Petitioner has used the PECP as a vehicle to discriminate against disabled and injured workers in violation of the ADA.* Respondents mention in their complaints, that they have been laid off in violation of the PECP *because the PECP is discriminatory on its face.* Each Respondent was low rated and laid off due to their physical disabilities even when they were supposedly "accommodated" with light or restricted duty within their trade's job description.

Thus, Petitioner errs in characterizing Respondents' claims as being based on its failure to bargain in good faith in enacting the PECP, or on the contention that its low rating workers in violation of its own PECP is a breach of a term or condition of employment which is an action within the exclusive jurisdiction of the National Labor Relations Act, ("NLRA"), 29 U.S.C. § 151, *et seq.* The fact that the PECP was unilaterally enacted has absolutely no bearing on the true substance of Respondents' claims. On the other hand, the fact that Petitioners have used this PECP to discriminate against disabled workers, does. Thus, Respondents' position is that *to allow Petitioner to use this PECP to carry out this discrimination in violation of the ADA would literally nullify the purpose and goals of the ADA.*

Thus, although it may be true that Petitioner failed to bargain in good faith, which in turn enables the union to pursue an unfair labor practice charge with the National Labor Relations Board, ("NLRB"), this complaint represents the exercise of Respondents' right to not be discriminated against by Petitioner because of their physical limitations — a fundamental right protected solely by the Americans with Disabilities Act.

Petitioner moved for judgment on the pleadings or in the alternative for summary judgment. The district court viewed Respondents' claims as essentially seeking to remedy an unfair labor practice rather than seeking to remedy a discriminatory practice and thus, dismissed Respondents' claims. The district court further recognized that Title VII civil rights claims are not subject to preemption by the NLRA, yet held that the ADA is not a civil rights statute.

Respondents timely appealed the district court's decision. A unanimous Ninth Circuit panel reversed. In an opinion by the Hon. Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation, the Appellate Court recognized that when the courts are presented with sensitive issues of national labor policy it is best to leave resolution of such issues to the administrative agencies created by Congress for that purpose, such as the NLRB. However, the Appellate Court opined that such was not the case in the instant matter. The Appellate Court noted that the determination of unlawful discriminatory employment practices is hardly a question beyond the conventional experience of judges, nor does it raise issue within the special competence of the NLRB.

> Just as federal courts are ill-equipped to displace the role of the NLRB, the NLRB is not-suited to balance the competing federal interests presented by these two statutes. **To permit the NLRB to decide claims**

> **in which an employer's reasonable accommodation may violate the NLRA would leave the interpretation of the ADA to the NLRB.** This judicial function certainly exceeds that agency's expertise and authority . . . Finally, and perhaps most importantly, we note that preemption in this case would leave disabled union employees who are the victims of unlawful discrimination without recourse to the federal forum which Congress sought to provide.

(*See* Pet. App. A, 12-13 (emphasis added)).

The Court of Appeals further unanimously denied a petition for rehearing. Petitioner's suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration. (*See* Pet. App. B).

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILS TO SET FORTH COMPELLING REASONS FOR THIS COURT TO GRANT ITS PETITION FOR WRIT OF CERTIORARI.

In the instant matter, Petitioner has failed to set forth any compelling reason for its petition for writ of certiorari to be heard. The Petition misinterprets the opinion of the unanimous Ninth Circuit panel. The Ninth Circuit did not hold, as Petitioner would have it, that *Garmon, infra*, preemption never applies when a federal claim is involved. On the contrary, the Appellate Court acknowledged that *Garmon* principles can apply to federal statutes when the statutory claim turns on an allegation of an activity the NLRA makes illegal. It went on to cite prior

Supreme Court and other appellate court decisions where two federal statutes were involved and *Garmon* preemption was not applied. Thus, after having reviewed the facts as plead, the Ninth Circuit held that Respondent's claims herein are grounded on violations of the ADA and not on violations of the NLRA.

The Appellate Court, therefore, is not departing from an established rule. The *Garmon* preemption doctrine has not been applied in a manner that is either, inconsistent, nor conflicts, with any decision of this Court and other courts of appeals, and therefore, this writ should be denied.

II.

CONTRARY TO PETITIONERS ATTEMPTS TO MISCONSTRUE RESPONDENTS' CLAIMS, THE TRUE GRAVAMEN OF PLAINTIFFS' COMPLAINTS IS THAT THE PECP IS A "STANDARD, CRITERIA OR METHOD OF ADMINISTRATION THAT HAS THE EFFECT OF DISCRIMINATION ON THE BASIS OF DISABILITY OR PERPETUATES DISCRIMINATION ON THAT BASIS" IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT.

Section 102 of the Americans with Disabilities Act ("ADA"), states,

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) As used in subsection (a) of this section, the term **"discriminate"** includes —

(3) **utilizing standards, criteria, or methods of administration** —

(A) that have the **effect** of **discrimination** on the basis of **disability**; or

(B) that **perpetuate the discrimination** of others who are subject to common administrative control; (42 U.S.C. § 12112)

Petitioner has attempted to misconstrue Respondents claims by focusing on the fact that Respondents mention that Petitioner unilaterally enacted the PECP. This was merely a factual statement made for the purpose of showing how the PECP was enacted. Respondents are not, nor ever have, complained that Petitioner failed to bargain in good faith in violation of the NLRA, nor that Petitioner has violated some term or condition of employment which is an action within the exclusive jurisdiction of the NLRA.

Respondents allege that the PECP is discriminatory on its face, and that as defined in § 102(b)(3) of the ADA, *supra*, the PECP is, "a standard, criteria or method of administration that has the effect of discrimination, or perpetuates discrimination on the basis of disability." Petitioner, nevertheless, continues to purposefully twist the gravamen of Respondents claims in an effort to avoid addressing the actual issues involved in this matter.

III.

THE NINTH CIRCUIT WAS CORRECT IN RULING THAT THE *GARMON* PREEMPTION DOCTRINE DOES NOT APPLY IN THE INSTANT MATTER BECAUSE RESPONDENTS' CLAIMS ARE GROUNDED ON VIOLATIONS OF THE ADA AND NOT ON VIOLATIONS OF THE NLRA.

As mentioned above, Petitioner has continuously misconstrued Respondents' allegations. Respondents have firmly argued throughout that their ADA claims are not preempted by the NLRA under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). First, it is well established that *Garmon* has been interpreted to address conflict between state and even federal systems for regulating labor activity, however, it has not been applied to preempt federal claims premised upon ADA violations.

Petitioner seems to suggest that *Garmon*, although rooted in the Supremacy Clause of the U.S. Constitution, Art. IV, Cl. 2, has been extended to cover not only conflict between federal and state laws, but also conflicts between any two federal statutes. However, *Garmon* preemption has only been applied to conflicting state laws regarding the regulation of labor activities, and at times, to other federal statutes which overlap **in the area of labor activity regulation made illegal by virtue of the NLRA**. The NLRA, however, has not been extended to preempt federal statutes which prohibit discrimination on the basis of race, gender or even physical disabilities.

The unanimous Ninth Circuit panel did not hold that *Garmon* preemption never applies when a federal claim is involved. On the contrary, the Appellate Court acknowledged that when a federal claim is premised upon conduct made illegal

by virtue of the NLRA, *Garmon* principles can apply. The Appellate Court, however, did not feel that such was the case in the instant matter. Thus, the question presented in this case is not a broad based legal question, but rather a narrow question of how to characterize these particular claims.

Petitioner cites various cases supposedly involving a conflict between the NLRA and another federal statute. However, upon close review, it is apparent that the cases do not apply to the instant matter because the plaintiff involved specifically alleged labor activity violations which are illegal by virtue of the NLRA, unlike in the instant matter, where the claims brought forth by Respondents are illegal by virtue of the Americans with Disabilities Act. *See, e.g., Tamburello v. Comm-Tract Corp.*, 67 F.3d 973 (1995) (Plaintiff specifically alleged harassment by his employer as a result of his union activities as a union steward.); *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, etc.*, 421 U.S. 616 (1975) (Defendant building trades union supported its efforts to organize mechanical subcontractors by picketing the plaintiff general building contractor, and defendant sought relief under the Sherman Act.); *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co. Inc.*, 779 F.2d 497 (1985) (Trust fund filed suits against employer seeking unpaid contributions from the date expiration of the collective bargaining agreements.); *Chamber of Commerce v. Reich*, 83 F.3d 439 (1996) (Plaintiffs brought actions for declaratory and injunctive relief challenging an Executive Order authorizing the Secretary of Labor to disqualify from certain federal contracts, employers who hired permanent replacement workers during a lawful labor strike.); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1990) (Plaintiff alleged that in addition to his race, he was not promoted for thirteen years because of his union activities within the hospital where he worked.); *New Bedford Fisherman's Welfare Fund v. Baltic*

Enterprises Inc., 813 F.2d 503 (1987) (Plaintiffs initiated an action in federal court seeking to compel Defendant's payment of delinquent contributions under the terms of an expired collective bargaining agreement until the parties reached an impasse in negotiations.); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654 (1992) (Plaintiffs brought action alleging common-law fraud and misrepresentation, as well as violations of the Labor Management Relations Act and RICO.); *Brennan v. Chestnut*, 777 F. Supp. 1469 (D. Minn. 1991) (Plaintiffs who were pilots and shareholders in a labor organization brought RICO claims against labor organization claiming mail fraud, wire fraud and extortion.); *Butchers' Union, Local No. 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986) (Plaintiff labor unions brought RICO action against employer who was allegedly paying representative of labor organization in order to influence exercise of collective bargaining rights in violation of the Labor Management Relations Act.); *Crown Clothing Co. v. Papale*, 854 F. Supp. 316 (D. N.J 1994) (Plaintiff employer claimed that the union illegally conspired to use withdrawal liability under the Multiemployer Pension Plan Amendment Act as a bargaining chip in labor negotiations.); *MHC, Inc. v. International Union, United Mine Workers*, 685 F. Supp. 1370 (E.D. Ky. 1988) (Plaintiffs brought Civil RICO action to recover for union and union members' alleged conspiracy to deprive them of property rights through their illegal picketing and multiple acts of violence.).

Despite Petitioner's efforts to argue that the Court of Appeals Opinion conflicts with the decisions of this court and other federal courts of appeals that have applied traditional principles of *Garmon* preemption when the conflict is between the NLRA and another federal statute, it is evident that because Respondents have alleged discrimination on the basis of their physical disabilities in violation of the ADA, and at no time, have alleged any violation of the NLRA, the Ninth Circuit decision was

correct and thus, *Garmon* principles of NLRA preemption do not apply in the instant matter.

IV.

WHERE TWO FEDERAL STATUTES ARE ALLEGED TO BE IN CONFLICT, PREEMPTION BECOMES A MATTER OF CONGRESSIONAL INTENT.

In the instant matter, Petitioner is arguing that *Garmon* principles of NLRA preemption are applicable to claims brought forth by individuals pursuant to violations of the ADA. Petitioner seems to suggest that whenever an ADA claim brings into question the employer's relationship with the union, the NLRA is automatically implicated and thus, the NLRB has exclusive jurisdiction. However, when resolving an issue of conflict between two federal statutes, preemption becomes a question of Congressional intent. It cannot be assumed that Congress intended to repeal part of one statute over another, unless Congress so states. Therefore, both statutes must be construed in a manner that preserves them both.

In the instant matter, it is obvious that Congress recognized that its various civil rights statutes, including the ADA, would be enforced in a workplace where an employer and a union are engaged in collective bargaining. Thus, Congress ensured, within the statutory language of the ADA, that collective bargaining agreements would be regulated.

Section 102 of the ADA states,

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement ,

> or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) As used in subsection (a) of this section, the term "discriminate" includes —
>
> > (2) **participating in a contractual or other arrangement** or relationship **that has the effect** of subjecting a covered entity's qualified applicant or employee with a disability to the **discrimination** prohibited by this title (such relationship includes a relationship with a[] . . . **labor union** . . .

42 U.S.C. § 12112.

For instance, Petitioner is arguing that whenever an employer's rules may have been violated or implemented improperly, (*i.e.*, enacting the PECP, whether unilaterally or not), the NLRA is implicated and hence, a claim premised upon ADA violations cannot be brought. To so hold would literally nullify the ADA in the context of collective bargaining agreements, something which Congress, as noted above, obviously had not intended.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that NASSCO's petition for writ certiorari be denied.

Respectfully submitted,

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